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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

MENDOCINO TRANSIT AUTHORITY, Plaintiff and Appellant, v. HENRY O. ERICKSON et al., Defendants and Respondents.	A100231 (Mendocino County Super. Ct. No. CV87084)

On December 27, 2001, plaintiff/appellant Mendocino Transit Authority (Authority or MTA) filed a complaint in superior court seeking to acquire by eminent domain a fee simple interest and contiguous easements in certain property adjoining Highway 101 in north Ukiah. The declared purpose of the taking was the acquisition of a site for construction of the North Ukiah Transit Center to serve the Authority's intracounty passenger bus operations. The complaint alleged the proceeding was instituted under provisions of California's eminent domain statutes and the Joint Exercise of Powers Act. (Gov. Code, § 6502, 6508.) The latter statute was invoked because the Authority is a joint powers entity—a municipal corporation formed under the provisions of the Joint Exercise of Powers Act by the County of Mendocino and the four incorporated cities within it, Ukiah, Willits, Fort Bragg and Point Arena.

Defendants/respondents, the owners and lessees of the subject parcels, demurred to the complaint on the principal ground the Authority lacked the power of eminent domain, not having been delegated that power by the governmental entities that formed the MTA through a joint powers agreement. Following briefing and oral argument,

Judge Henderson sustained defendants' demurrer with leave to amend. Appellant Authority declined to amend its complaint and, by stipulation of the parties, a final judgment of dismissal—from which this appeal is taken—was entered by the trial court. We affirm.

ANALYSIS

The Authority's appeal requires us to resolve a single, circumscribed question: Does the joint powers agreement establishing the MTA, executed by the county and the four incorporated cities, delegate to the Authority the power to acquire property by judicial proceedings in eminent domain? As indicated, Judge Henderson answered that question in the negative. He agreed with the Authority that the text of the joint powers agreement at issue reasonably might be read to encompass a power of eminent domain. Reading the words in their ordinary and popular sense, the agreement empowers the Authority " 'to acquire . . . property.' " (Italics omitted.) Relying on precedents from this court and our Supreme Court, however, the trial judge concluded that in construing grants of the power of eminent domain, courts follow a principle of strict construction. Under that regime, when a grant of the power of condemnation is not made in express terms, it must appear by clear implication. In this case, Judge Henderson went on to reason, because the power to acquire property appeared only in the recital of the general powers delegated to the Authority, and not in the "tailored powers" specifically granted the Authority elsewhere in the agreement, "it cannot be said that the power of eminent domain is *clearly* implied in the agreement." (Italics in original.)

In urging us to overturn the superior court's result, the Authority insists the rule of strict construction relied on by Judge Henderson is "old" law and no longer good law. According to appellant, three features of the case law underpinning the principle of strict construction on which the trial court relied make it inapplicable in these circumstances. First, the rule of strict construction, first declared over a century ago by our Supreme Court in *San Francisco and Alameda Water Co. v. Alameda Water Co.* (1869) 36 Cal. 639, 644 (*Alameda Water*), rests on a now-archaic principle that legislation "in

derogation of the common law and of general private rights . . . must be strictly construed." (*Id*. at p. 644.) Second, the Authority's argument continues, at least since *City of Oakland v. Oakland Raiders* (1982) 32 Cal.3d 60 (*Oakland Raiders*)—upholding a municipality's power to take a professional football club by eminent domain—notions of the appropriate scope of both the condemnation power and the legitimate governmental powers of cities have evolved. Third and last, the Authority tells us that most of the precedents relied on by the trial court in support of its result dealt not with a city's power of eminent domain per se, but rather with the long-vexed question of the power to condemn property extraterritorially, that is, outside the environs of the municipality. (See, e.g., *Harden v. Superior Court* (1955) 44 Cal.2d 630 (*Harden*); *Kenneth Mebane Ranches v. Superior Court* (1992) 10 Cal.App.4th 276 (*Mebane*).)[1] We are unpersuaded.

In the *Oakland Raiders* opinion (*Oakland Raiders, supra,* 32 Cal.3d 60), Justice Richardson, writing for an all-but-unanimous court, distilled the handful of principles relevant here. "We have held," he wrote, "that the 'power of eminent domain is an inherent attribute of sovereignty.' [Citations.] This sovereign power has been described as 'universally' recognized and 'necessary to the very existence of government.' [Citation.]" (32 Cal.3d at p. 64.) Notwithstanding these principles, indeed "[i]n contrast to the broad powers of *general* government . . . 'a municipal corporation has no inherent power of eminent domain and can exercise it only when expressly authorized by law. [Citation.]' " (*Ibid*., italics in ordinal.)

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[1] We also take note, as does the Authority, that California's eminent domain law was revised extensively in 1976 by the Law Revision Commission to moot a source of much prior litigation. Prior law had limited the condemnation power to specified public purposes, a limitation removed by the 1976 reform legislation, which substituted in its place a power "to acquire property necessary for any of [the condemning authority's] powers or functions." (*Oakland Raiders, supra*, at p. 72, quoting the Law Revision Commission's report.) As indicated in the main text, however, we do not agree this revision has any impact on the question before us here.

The notion that, despite being an inherent feature of government, the eminent domain power is not naturally an incident of a *municipal* corporation is a consequence of the structure of our constitutional government. Counties and municipalities are mutable instruments of the sovereign, " 'mere subdivisions of the State.' " (*Byers v. Board of Supervisors* (1968) 262 Cal.App.2d 148, 155.) Their powers of eminent domain, accordingly, are delegated by the state, are derivative rather than inherent. From this latter principle another black-letter rule—one relied on by Judge Henderson—is derived. A "statutory grant of the power of eminent domain must be indicated by express terms or by clear implication." (*Golden Gate Bridge etc. Dist. v. Muzzi* (1978) 83 Cal.App.3d 707, 712; see also *Mebane, supra,*10 Cal.App.4th at p. 282; *County of Marin v. Superior Court* (1960) 53 Cal.2d 633, 636; *City of Menlo Park v. Artino* (1957) 151 Cal.App.2d 261, 267; *City and County of San Francisco v. Ross* (1955) 44 Cal.2d 52, 55; *Harden*, *supra*, 44 Cal.2d 630, 640; *Skreden v. Superior Court* (1975) 54 Cal.App.3d 114, 117; cf. *Burbank-Glendale-Pasadena Airport Authority v. Hensler* (2000) 83 Cal.App.4th 556.)

In our view, the foregoing principles, even if "old," remain vital. Indeed, they were reaffirmed expressly by our high court in its *Oakland Raiders* opinion, a "modern" takings case on which the Authority relies. (See *Oakland Raiders, supra,* 32 Cal.3d at p. 64.) Neither do we understand how changes in the public's and the judiciary's conception of the legitimate ends of local government, relied on by the Authority, can work any change in the principles discussed above. While it may be true that such evolving notions contribute to outcomes like that in the *Oakland Raiders* case, the issues presented in that and like litigation have more to do with evolving definitions of "property" and notions of "public use," rather than with the source of a municipality's condemnation power.[2] (See, e.g., *Oakland Raiders, supra*, 32 Cal.3d at pp. 66-68.)

Nor are we persuaded by the Authority's other line of argument, the claim that because the purported transfer of the power of eminent domain at issue here arose out of

[2] We take a like view of the Authority's argument that the line of case law on which the trial court relied is somehow not in point because it dealt with issues of extraterritoriality.

a contract, the constitutional and statutory principles discussed above are not in point.[3] On the contrary, we believe they continue to apply in the context of a joint powers agreement such as that presented in this case. We do not think, in other words, that enduring constitutional and statutory limitations on the power of eminent domain can easily be diluted or circumvented simply by casting them as issues of contract. As our high court remarked almost a hundred and fifty years ago, eminent domain statutes authorize "proceeding[s] by which a citizen is divested of property rights without his consent; the power conferred for such purpose . . . should, therefore, never be extended or enlarged by implication . . . ." (*Alameda Water, supra*, 36 Cal. at p. 644.) We see no warrant for the argument that a contractual grant of the power of eminent domain should be evaluated on appeal under a less demanding standard of review.[4] Here, the agreement itself merely provides, under "General Powers" that the MTA shall have the power to "acquire, hold, or dispose of property . . . ." We agree with the trial court that this

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[3] We have not reached the issue of "necessary implication," as it was not squarely presented in opposition to the demurrer below, and the record was not adequately developed on the issue. While we do not agree with the analysis of the dissent, we do not feel that we should "reach out" to address that issue.

[4] We note that the parties appear to agree that Government Code section 6508 *could* permit the delegation of the authority to acquire property by eminent domain (the powers that may be delegated to a joint powers agreement include "to make and enter contracts, or to employ agents and employees, or to acquire, construct, manage, maintain or operate any building, works or improvements, or *to acquire, hold or dispose of property* or to incur debts, liabilities or obligations." (Italics added.) Given our finding that the joint powers agreement here did not specifically authorize such a delegation of authority, we need not reach the issue of whether section 6508 is sufficiently specific (under the above authority regarding the requirement of express statutory authorization) to permit such a delegation, *if* the joint powers agreement by its terms does so, or if such authorization of delegation of the power of eminent domain is supported by other statutory authority. (See *Burbank-Glendale-Pasadena Airport Authority v. Hensler*, *supra,* 83 Cal.App.4th 556.)

language was not specific enough to delegate the authority to acquire property by the power of eminent domain.[5]

Last, of course, we take note of Judge Henderson's parting remark in his memorandum order: "This ruling does not in any way prevent the MTA from acquiring the desired property by eminent domain. If the county and the four cities so wish, they can simply amend the joint powers agreement to specifically delegate and include the power to acquire real property by eminent domain."

CONCLUSION

The judgment of the superior court is affirmed.

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Sepulveda, J.

I concur:

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Kay, P.J.

[5] We note that the "General Powers" section similarly provides that the MTA may acquire equipment, but "Specific Powers" section (paragraph 5) specifically delineates that it "shall also have the power to contract for the purchase, lease, or rental of whatever services or equipment it may determine necessary . . . ." No similar specification of specific powers regarding the acquisition of property is delineated in the agreement, as noted by the trial court.

Dissenting Opinion of Rivera, J.

I agree with the majority that strict construction of the power of eminent domain is alive and well in our state's jurisprudence. (Maj. opn. *ante*, at p. 2.) But I part company with the decision to affirm. (*Id.* at p. 6.) I would conclude the trial court erred in failing to consider whether the power of eminent domain was necessarily or fairly implied in the powers expressly granted to the Mendocino Transit Authority (MTA), or was essential to the declared objects and purposes of the MTA.[1] Accordingly, I would reverse.

The trial court's decision proceeds from the tacit but undisputed premise that the language of Government Code section 6508 is sufficiently clear to authorize the delegation of the eminent domain power to a joint powers authority, even though that language is not explicit.[2] Proceeding from and consistent with this premise, the trial court holds that the same language in the Agreement can "be reasonably construed" to

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[1] The majority declines to reach this issue because the record is insufficient for a determination of the case on that basis. (Maj. opn., *ante*, at p. 5, fn 3.) It is true there is a dearth of discussion in the record on this question. While mentioning the concepts of "clear implication" or "necessary implication" in the abstract, the issue was not explored in the trial court in any depth, and was mentioned only briefly during oral argument. The focus of the briefing was, rather, on the statutes authorizing joint powers agencies, and on the express language of the joint powers agreement creating the MTA (Agreement). Yet this unbriefed issue became, almost inadvertently, the pivotal rationale for the trial court's decision. Given that the issue is a "jurisdictional question of public importance" (*Kenneth Mebane Ranches v. Superior Court* (1992) 10 Cal.App.4th 276, 280 (*Kenneth Mebane Ranches*)), and given that appellant has raised the issue before this court, I believe the matter merits our attention.

[2] The relevant statutory language is as follows: "If the agency . . . is authorized, in its own name, . . . to acquire, hold or dispose of property . . . , said agency shall have the power to sue and be sued in its own name." (Gov. Code, § 6508, 1st ¶.) Appellant also relies on other statutes and other provisions in the Agreement as sources of its empowerment to condemn private property, but unlike section 6508, these sources of power are disputed.

delegate the power of eminent domain.[3] No one takes issue with this conclusion. The only unresolved issue, then, is whether the "strict construction" overlay nevertheless precludes this admittedly reasonable interpretation of the Agreement, as a matter of law. The trial court concluded that it did.[4]

Acknowledging that the power of eminent domain can be conferred either by "express terms" or by "clear implication" (italics omitted), the court found neither. Limiting its search therefor to two paragraphs in the Agreement ("General Powers" and "Specific Powers"), the court held: "Where the grant is not made by express terms it must be made by *clear* implication. [Citation.] The language relating to the acquisition of property is found only in the recital of the general, statutory powers (taken from Sec. 6508) delegated to the MTA. [Citation.] The specific, tailored powers . . . do not contain any language from which it could be reasonably implied that the contracting parties specifically intended to include the power of eminent domain as to real property. Under these circumstances, it cannot be said that the power of eminent domain is *clearly* implied from the agreement."

In my view, the trial court erred in myopically focusing only on the paragraphs labeled "General Powers" and "Specific Powers" in the Agreement to determine whether condemnation powers were "clearly implied" (italics omitted). The cases that speak to this issue do not limit their attention so narrowly, but consider a far broader range of contextual facts, including especially, the entity's statutory powers, the entity's purpose, and whether that purpose and those powers can be accomplished in the absence of the power to acquire the property by eminent domain.

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[3] The Agreement provides: "Said MTA shall have the powers to and is authorized . . . to acquire, hold, or dispose of property . . . and to sue or be sued in its own name. (Section 6508[.])"

[4] The logic of this conclusion is debatable. If the statutory language, which is also subject to the rule of strict construction, is deemed by all parties to be sufficiently explicit to *authorize* the delegation of the power of eminent domain, it would seem to follow that the use of that very language by the authorizing bodies would be sufficient to *effectuate* its delegation. But that is not the focus of this opinion.

The guiding legal concepts are reasonably clear. "A statutory grant of eminent domain power must be indicated by express terms or by clear implication. Statutory language defining eminent domain powers is strictly construed and any reasonable doubt concerning the existence of the power is resolved against the entity. However, a statute granting the power of eminent domain should be construed to effectuate and not defeat the purpose for which it was enacted." (*Kenneth Mebane Ranches, supra*, 10 Cal.App.4th at pp. 282-283, citing *Golden Gate Bridge etc. Dist. v. Muzzi* (1978) 83 Cal.App.3d 707, 712 (*Muzzi*); see also *City of North Sacramento v. Citizens Utilities Co.* (1961) 192 Cal.App.2d 482, 483 (*City of North Sacramento*) [setting forth the "well established [rule] that the power of eminent domain can arise by implication from the 'powers expressly given' "].) Condemnation powers may also arise where such are " 'necessarily or fairly implied in or incident to the powers expressly granted, or essential to the declared objects and purposes of the [entity].' " (*Harden v. Superior Court* (1955) 44 Cal.2d 630, 639 (*Harden*).)

So, for example, in *People v. Superior Court* (1937) 10 Cal.2d 288, the court considered the question whether the title of an act conferred the power of eminent domain on a specially created commission. The title stated: an "act to establish 'the . . . Southern California prison under the management and control of the state board of prison directors; to provide for purchase or acquirement of . . . lands by unconditional gift or use of lands owned by the state therefor; and the construction of buildings and other improvements in connection therewith; . . . and to make an appropriation therefor.' " (*Id.* at p. 289.) Although the body of the legislation expressly empowered the commission to institute condemnation proceedings, the argument was made that this empowerment was defective because it was not found also in the title of the act. The court concluded that apart from the fact the statute itself authorized the commission to condemn property, the title also conferred that power by clear implication. The court reasoned that the declared purpose of the act was to *establish* a prison. Therefore, "[i]t would seem most improbable that anyone could conceive of the establishment of a modern prison in the absence of at least the construction of suitable buildings for that purpose; and if the existence of such an

element in the consummation of the general purpose be conceded, very naturally it would follow that a location or site for the building or buildings would be of paramount necessity;—from which situation, the mind of any interested person would be directed to the several means by or through which a suitable site might be obtained; and . . . he would at once understand and appreciate the fact that one of the available means to that end would be by or through the procedure commonly known as a condemnation of the property of some private citizen." (*Id.* at p. 295.)

The seminal case on the rule of "clear implication" is *Southern P. R. R. Co. v. Railway Co.* (1896) 111 Cal. 221. There, plaintiff railroad company sought to condemn right-of-way parallel to defendant's railroad on a road owned by defendant. Defendant challenged plaintiff's authority to condemn a portion of its road for another railroad. The court first noted that because the power of eminent domain "is to be exercised under and by virtue of the legislative will . . . . [¶] . . . it is an accepted canon of the law that the right to exercise the power of eminent domain must be found in some statute of the state, and that such right must be expressly given, or arise by necessary implication from powers expressly given." (*Id.* at pp. 226-227.) There was no statute expressly conferring upon plaintiff the power of eminent domain. Nevertheless, the court found the power of eminent domain had been delegated to plaintiff by virtue of legislation that granted to any railroad corporation the right " 'to lay out its roads . . . and to construct or maintain the same with a single or double track, and with such appendages and adjuncts as may be necessary for the convenient use of the same.' " (*Id.* at p. 227.) The court further found plaintiff's power to condemn the property of another railroad in the statutory language authorizing a railroad corporation " 'to cross, intersect, join or unite its railroad with any other railroad, either before or after construction, at any point upon its route, and upon the grounds of such other railroad corporation.' " (*Ibid.*) Rounding out the analysis the court concluded, "[t]urning to the subject of eminent domain, . . . we find that it may be exercised in favor of a variety of public uses, among which are 'horse and steam railroads.' " (*Ibid.*) Thus, in determining the question of implied condemnation authority, the court's focus was on the statutory purpose and powers of the agency.

More recent cases have applied the canon of clear or necessary implication to the *scope* of eminent domain powers. In those cases, too, if the power cannot be found in the terms of the express grant, the courts look at the entity's purpose, its expressly granted powers, and other relevant facts to determine whether the expanded exercise of eminent domain is " 'necessarily or fairly implied in or incident to the powers expressly granted, or essential to the declared objects and purposes of the corporation.' " (*Harden, supra,* 44 Cal.2d at p. 639.)

The case of *Skreden v. Superior Court* (1975) 54 Cal.App.3d 114 (*Skreden*) is particularly instructive. In *Skreden*, a mosquito abatement district sought to condemn property for use as a corporation yard and an office. The landowner demurred, contending the district had no power to do so inasmuch as its statutory powers of condemnation did not include taking land for an office or corporation yard. The demurrer was overruled and the landowner sought a writ of prohibition.

The Court of Appeal considered the general purpose of a mosquito abatement district and reviewed the statute granting its various powers to carry out that purpose in order to decide whether, even applying a strict construction to the grant of eminent domain, the power to condemn for an office and corporation yard could be clearly implied. The statute provided that the district was authorized to " 'build, construct, repair, and maintain, necessary dikes, levees, cuts, canals, or ditches upon any land, and acquire by purchase, condemnation, or by other lawful means, in the name of the district, any lands, rights-of-way easements, property or material necessary for any of those purposes. . . . [and to d]o any and all things necessary or incident to the powers granted by, and to carry out the objects specified in, this chapter.' " (*Skreden, supra*, 54 Cal.App.3d at pp. 116-117.) The court then concluded there was no reasonable doubt that these purposes and powers included the power to condemn land for office and corporation yard purposes by "clear implication." "We apprehend that it is reasonable to conclude that a mosquito abatement district requires an office and a corporation yard in order for it to perform the specific objectives for which it was formed. As observed in

City of North Sacramento, '. . . the power of eminent domain can arise by implication from the "powers expressly given." ' [Citations.]" (*Id.* at pp. 117-118.)

The court also considered whether this issue could appropriately be resolved on demurrer. "The complaint in this case alleges that petitioners' lands are necessary for use as a district office and corporation yard. Accordingly, the complaint states a cause of action. The question whether the lands are in fact necessary for the stated purposes is a matter to be resolved at trial, i.e., the District will have to establish a necessary nexus between the building of dikes, levees, cuts, canals or ditches and the proposed use." (*Skreden, supra,* 54 Cal.App.3d at p. 118.)

Other cases addressing extraterritorial condemnation similarly examine, at minimum, the purpose of the agency, as well as its powers and in appropriate instances additional facts as well. (See *Muzzi, supra,* 83 Cal.App.3d at pp. 712-713 [court looked at conditions of approval for the project and concluded that the "power to condemn property necessary for water transportation implicitly includes the power to condemn property necessary for mitigation of [its] environmental effects"]; cf. *Kenneth Mebane Ranches, supra,* 10 Cal.App.4th at p. 292 [court looked at conditions of approval and mitigation measure imposed on the flood control district's project and concluded extraterritorial condemnation could not be implied as a matter of necessity nor as " 'essential to the declared objects' of the District"]; and see *City of North Sacramento, supra,* 192 Cal.App.2d at pp. 486-487 [court reviewed statutory powers related to city's acquisition and operation of a water system; no express authorization to condemn portions of a water district lying outside city's boundaries, but such authorization was implied "as incidental to the existence of other powers expressly granted"].)

In this case, the trial court failed to consider any of the MTA's purposes or statutory powers in determining whether the power of eminent domain was " 'necessarily or fairly implied in or incident to the powers expressly granted, or essential to the

declared objects and purposes of the [MTA].' " (*Harden, supra,* 44 Cal.2d at p. 639.)[5] For example, the Agreement states that the MTA was formed "to provide for public transportation services within Mendocino County in accord with the Transportation Development Act (Public Utilities Code, Section 99200, et. seq.)." These statutes comprise a complex set of laws providing for the planning, funding and development of public transit, with a multitude of requirements pertaining to how funds will be allocated and expended. Pursuant to these statutes, a transit agency applies for state funds, which are available for a variety of projects, including "projects that serve the needs of commuting bicyclists, including, but not limited to, new trails serving major transportation corridors, [and] secure bicycle parking at employment centers. . . ." (Pub. Util. Code, § 99234, subd. (e).) Funding is also available for capital improvement projects such as park-and-ride lots, terminal facilities, bus waiting shelters (*id.*, § 99268.7), and intermodal or multimodal transportation terminals (*id.*, §§ 99317, 99317.8, 99400.5).

The trial court did not consider the effect of this statutory scheme, even though the Agreement expressly provides that "[t]he MTA shall specifically have the power to apply for and receive Transportation Development Act . . . and other funds as a public transportation operator." Nor did it apply to its analysis any common understanding as to what a transit authority must do to accomplish its purpose of providing public transportation. (See, e.g., *People v. Superior Court, supra,* 10 Cal.2d at p. 295 [speaking to what "the mind of any interested person" would understand must be done to "establish" a prison].) Nor did it appear to consider the fact, as did the court in *Skreden*, that the complaint alleged the land was necessary to build a transit center—raising at least

[5] This should not be understood as criticizing the court for the oversight. This information was only thinly developed and presented by the parties below, where they instead focused narrowly on the language of the Agreement and of the Joint Exercise of Powers Act (Gov. Code, § 6500 et seq.).

an inference that the power of eminent domain is necessary for the MTA to carry out its mission.[6]

In short, in addition to determining whether the *words* of the Agreement either expressly or impliedly granted the power of eminent domain, the trial court should have determined also whether a "strict construction" of the Agreement precluding the power of eminent domain "would prevent the accomplishment of [the Agreement's] manifest purpose." (*City of Anaheim v. Michel* (1968) 259 Cal.App.2d 835, 838.) I would reverse and remand for the trial court's further consideration.

RIVERA, J.

[6] While I am of the view that these matters should have been considered before determining whether the MTA has the power of eminent domain, I would express no view on the outcome of this question. It may be that after due consideration of all the information before it, the trial court would conclude that the power of eminent domain is neither "essential to the . . . declared objects or purposes" of the MTA (*Kenneth Mebane Ranches, supra*, 10 Cal.App.4th at p. 292) nor necessarily implied from the powers expressly given to the MTA (*Harden, supra*, 44 Cal.2d at p. 639). It could also conclude that the question is essentially a factual one, as did the court in *Skreden*, and therefore it cannot be decided on demurrer. (*Skreden, supra*, 54 Cal.App.3d at p. 118.) Indeed, this was appellant's contention below.